

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES WYNN,

Petitioner,

-v-

JOHN B. LEMPKE,

Respondent.

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ELECTRONICALLY FILED
DOC #: _____
DATE FILED: 5/5/09

No. 08 Civ. 3894 (RJS) (GWG)
ORDER

RICHARD J. SULLIVAN, District Judge:

Before the Court is the Report and Recommendation of the Honorable Gabriel W. Gorenstein, Magistrate Judge, in connection with the above captioned Petition for a writ of habeas corpus. For the reasons set forth below, the Court adopts the Report and Recommendation in its entirety.

Charles Wynn ("Petitioner") petitioned this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on April 25, 2008. On May 16, 2008, the Court ordered John B. Lempke ("Respondent") to show cause as to why a writ of habeas corpus should not be issued. The May 16, 2008 order gave Respondent sixty days to file an answer to the Court's order to show cause, and gave Petitioner thirty days from receipt of Respondent's answer to file a response. On July 9, 2008, the Court granted Respondent's request for an extension, ordering that Respondent may file an answer to the Court's order to show cause as to why a writ of habeas corpus should not issue no later than September 12, 2008. The Court received Respondent's answer on September 15, 2008, three days late. Under the terms of the Court's May 16, 2008 order, Petitioner's response to Respondent's answer was due on October 15, 2008. By order dated November 26, 2008, the Court, not having received any response from Petitioner, but cognizant of Petitioner's

pro se status, ordered that the Court would accept a response from Petitioner until December 26, 2008. The November 26, 2008 order also provided that if the Court did not receive any submission from Petitioner by December 26, 2008, the Court would deem the Petition fully submitted. Petitioner failed to make any submission. By Order dated January 7, 2009, the Court referred the Petition to Judge Gorenstein.

On April 14, 2009, Judge Gorenstein issued a Report and Recommendation concluding that Petitioner's application for a writ of habeas corpus should be denied. Judge Gorenstein found that Petitioner had procedurally defaulted on all of the claims raised in his Petition except for his claim brought pursuant to *Batson v. Kentucky*, 47 U.S. 79 (1986). (See Doc. No. 12 at 9-10.) Petitioner's claim under *Batson* alleged that peremptory strikes of jury panelists were based on impermissible discriminatory motives, in violation of the Equal Protection Clause of the Fourteenth Amendment. See *Messiah v. Duncan*, 435 F.3d 186, 194 (2d Cir. 2006) (internal citations omitted). Judge Gorenstein rejected Petitioner's claims made pursuant to *Batson*, concluding that Petitioner had failed to demonstrate by clear and convincing evidence that the trial court made an unreasonable determination of fact when it found that the prosecutor's reasons for exercising the peremptory challenges were not pretexts for racial discrimination. (See Doc. No. 12 at 15.) Based on these findings, Judge Gorenstein recommended that the Court deny the Petition. Petitioner failed to file timely objections to any portion of Judge Gorenstein's Report and Recommendation.

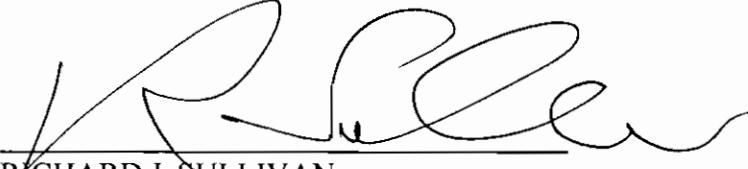
In reviewing a Report and Recommendation, the Court may "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). "To accept the report and recommendation of a magistrate, to which no timely objection has been made, a district court need only satisfy itself that there is no clear error

on the face of the record.”” *Cuadrado v. New York City Dep’t of Correction*, No. 08 Civ. 3026 (PAC) (THK), 2009 WL 1033268, at *1 (S.D.N.Y. Apr. 16, 2009) (quoting *Wilds v. United Parcel Serv.*, 262 F. Supp. 2d 163, 169 (S.D.N.Y.2003)); *see also Williams v. Senkowski*, No. 97 Civ. 3887 (DLC), 1999 WL 1192296, at *1 (S.D.N.Y. Dec. 13, 1999).

After a careful review of the record and Magistrate Judge Gorenstein’s well-reasoned Report and Recommendation, the Court finds no clear error and adopts the Report in its entirety. For the reasons set forth therein, Petitioner’s application for a writ of habeas corpus is DENIED. In addition, because Petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. *See* 28 U.S.C. § 2253; *Love v. McCray*, 43 F.3d 192, 195 (2d Cir. 2005). The Clerk of the Court is directed to close this case.

SO ORDERED.

Dated: New York, New York
 May 4, 2009



RICHARD J. SULLIVAN
UNITED STATES DISTRICT JUDGE

Copies of this order have been mailed to:

Charles Wynn
04-A-1964
Great Meadow Correctional Facility
11739 State Route 22
P.O. Box 51
Comstock, New York 12821-0051